Supreme Court, U.S.
FILED
941898 JUN 15 1995

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a conflict among the Circuits concerning a party's right in a diversity case to appeal an unfavorable judgment where it has accepted the benefits of a separable award?

2. Whether federal law governs the appealability of a judgment entered in a federal court in a diversity suit?

3. Whether Article III, Section 2 of the Constitution of the United States deprives the Courts of Appeals of jurisdiction where an appellant accepts, under protest, an unsatisfactory award pursuant to the directive of the District Court?

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STATEMENT OF THE CASE

Respondent, Henry Klein, adopts and relies on the statement of the case set forth by the 10th Circuit in *Klein v. Grynberg*, 44 F. 3d 1497 (10th Cir. 1995).

SUMMARY OF THE ARGUMENT

A party to a lawsuit who prevails on certain claims but not on others is free to accept the benefits of the award in its favor without compromising its ability or right to appeal the unfavorable award, provided that the claims are separable. The Circuit Courts are in agreement on this settled principle of law.

The appealability of judgments rendered by the District Courts is an issue governed by federal law. This Court has clearly established this precept, and the courts below have uniformly accepted it.

Article III, Section 2 of the Constitution of the United States permits a party to appeal a judgment provided the appellant retains a stake in the appeal; appellate jurisdiction is a creation of Congress, which governs the

appealability of judgments rendered by the District Courts. Thus, as long as the fundamental requirements of Article III are satisfied, there is no Constitutional bar to an appeal of an unsatisfactory judgment.

POINT I

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING A PARTY'S RIGHT TO APPEAL A DIVISIBLE PORTION OF AN ADVERSE JUDGMENT WHILE ACCEPTING THE BENEFIT OF A SEPARABLE AWARD.

When a court adjudicates separable claims, a party may accept the benefits of the claims on which it prevailed and appeal the separable claims that were decided against it. *Crawford v. Andrew Systems, Inc.*, 39 F. 3d 1151, 1153 (11th Cir. 1994).

The Circuit Courts agree on this rule. *See University of Rhode Island v. AW Chesteron Co.*, 2 F. 3d 1200, 1204 n. 7 (1st Cir. 1993); *Trusthouse Forte, Inc. v. 795 Fifth Ave. Corp.*, 756 F. 2d 255, 258-59 (2nd Cir. 1985); *Ashley v. Boehringer Ingelheim Pharmaceuticals*, 7 F. 3d 20, 25 (2nd Cir. 1993); accord *Dalle Tezze v. Director, Office of Worker's Compensation Programs, United States Dept. of Labor*, 814 F. 2d 129, 132-33 (3rd Cir. 1987); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F. 2d 120, 123 (4th Cir. 1992); *Lanier v. Sallas*, 777 F. 2d 321, 325 & n. 16 (5th Cir. 1985); *Tech Hills Eleven Assoc. v. Phoenix Home Life Mutual Ins. Co.*, 5 F. 3d 963, 970 (6th Cir. 1993); *First Nat'l Bank of Chicago v. Comptroller of the Currency of the United States*, 956 F. 2d 1360, 1363 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 93; *Byron v. Clay*, 867 F. 2d 1049, 1050 (7th Cir. 1989); *Denholm v. Houghton Mifflin Co.*, 912 F. 2d 357, 359 (9th Cir. 1990); *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F. 2d

960, 962 (Fed. Cir. 1992), *on remand* 795 F. Supp. 453, *affirmed* 16 F. 3d 420; *see also Sealover v. Canada*, 806 F. Supp. 59, 60 (M.D. Pa. 1992).

Petitioner claims that the 10th Circuit has articulated a rule in contravention of the rule applied by the 11th Circuit; however, the 11th Circuit has categorically endorsed the general rule: a party may appeal a judgment in its favor provided "the judgment appealed from consists of two or more separate, distinct and unrelated parts . . .". *Wynfield Inns v. Edward Leroux Group, Inc.*, 896 F. 2d 483, 489 (11th Cir. 1990). In *Crawford v. Andrew Systems, supra*, the most recent 11th Circuit decision on the issue, the court stated that:

> "It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing along, amount to an accord and satisfaction of the entire claim"
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> ***
>
> This circuit has addressed the issue only indirectly. In *Fidelcor Mortgage v. Ins. Co. of North America*, 820 F. 2d 367 (11th Cir. 1987), this Court applied the applicable Federal Common Law, looking to State law only to determine whether the portion of the judgment which was satisfied was distinct from the portion appealed. The Court accepted the principle that when a Court adjudicates separable or divisible controversies, the appealing party may accept the benefits of the divisible feature in his favor and challenge the portion adverse to him.

39 F.3d at 1153 (quoting *United States v. Hougham*, 364 U.S. 310, 312 (1960), *rehearing denied*, 364 U.S. 938 (1960)).

Petitioner misconstrues the 11th Circuit opinions on which it relies in asserting that certiorari should be granted to resolve the (imaginary) conflict between the 10th and 11th Circuits.

In *Wynfield Inns*, one of the 11th Circuit decisions on which petitioner relies, the court found that a plaintiff who accepted payment on a quantum meruit claim was barred from appealing an unfavorable directed verdict on its contract claim. The court determined that the two claims were indivisible--one could not recover for both, "such remedies being mutually exclusive and alternative measures of recovery" under state law. 896 F. 2d at 488-89.

Zaklama v. Mount Sinai Medical Center, 906 F. 2d 645 (11th Cir. 1990), the other 11th Circuit decision on which petitioner relies, is wholly inapposite. In *Zaklama*, the plaintiff in winning his employment discrimination suit prevailed on a single theory and received all that he had sought. His lawyers, however, after obtaining a writ of execution for the full judgment and filing satisfaction of final judgment, quarrelled with plaintiff over their fee arrangement.[1] After the District Court apportioned the award between plaintiff and his attorneys, the attorneys filed an untimely motion for fees. 906 F. 2d at 647. The 11th Circuit found that the motion was barred because it was untimely, and the appeal was barred because the attorneys had already executed on and accepted the portion designated for them by the District Court. Id. at 649-50.

Neither *Wynfield Inns* or *Zaklama* conflict with the 10th Circuit's decision in *Klein v. Grynberg*, 44 F. 3d 1497 (10th Cir. 1995). Respondents in *Klein* appealed the District Court's judgment N.O.V. as to the claim for breach of fiduciary duty. Respondents did not appeal the breach of

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1. That dispute is detailed in *Zaklama v. Mount Sinai Medical Center*, 906 F. 2d 651 (11th Cir. 1990).

contract claim, which is separate and divisible from the breach of fiduciary duty claim. The former sounds in contract, the latter in tort. *See Q.E.R., Inc. v. Hickerson,* 880 F. 2d 1178, 1182 (10th Cir. 1989) (citing *Restatement (2d) of Torts,* section 874 (1977); *Hill v. Bache Halsey Stuart Shields, Inc.,* 790 F. 2d 817 (10th Cir. 1986); *Security Nat'l Bank v. Peters, Writer and Christensen, Inc.,* 569 P. 2d 875, 880-81 (Colo. Ct. App. 1977). One may breach a contract without breaching a fiduciary duty and of course, the converse is true. In appealing the claim pertaining to breach of fiduciary duty--specifically, the District Court's judgment N.O.V.--the respondents, who had accepted their breach of contract awards, preserved their right to appeal the unfavorable judgment N.O.V. as to the breach of fiduciary duty.

Petitioner further argues that the respondents' unwilling acceptance of the $4.00 on the breach of fiduciary duty claim barred their appeal. This argument is unfounded. First, respondents' acceptance of the $4.00 was "under protest" and under the force of the ruling of the District Court which was appealed. Secondly, acceptance of payment of an unsatisfactory judgment, standing alone, does not bar an appeal of the entire claim. *United States v. Hougham,* 364 U.S. 310, 312 (1960); *Crawford,* 39 F.3d at 1153; *see also Electrical Fittings Corp. v. Thomas & Bets Co.,* 307 U.S. 241 (1939).

There is no conflict among the circuits on this issue, and the 10th circuit's decision in *Klein v. Grynberg,* far from being an anomaly, was a correct application of established and accepted precedent.

POINT II

FEDERAL LAW GOVERNS THE APPEALABILITY OF A JUDGMENT ENTERED IN A DISTRICT COURT HAVING DIVERSITY JURISDICTION.

This Court has already decided that the appealability of a judgment rendered by a federal district court is governed by federal law. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649-50 (1977) (citing *Hanna v. Plumer*, 380 U.S. 460, 466-69; and *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958)); *see generally* 6A *Moore's Federal Practice*, paragraph 59-08 [7] (1984).[2]

Since the issue is settled and the law is clear, this Court should deny the petition for certiorari on this question.

POINT III

THE COURT OF APPEALS WAS NOT DEPRIVED OF JURISDICTION UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF RESPONDENTS' EXECUTION ON THE JUDGMENT.

There was a case in controversy in which respondent, Henry Klein, had a direct stake, which case was appealed to the 10th Circuit. Petitioner, however, argues that by executing on the judgment (whether petitioner

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2. *Donovan*, which petitioner neglected to cite, also stated at 429 U.S. 649: "In federal court . . . the acceptance of a remittitur on one count of a complaint does not bar an appeal from an adverse judgment with respect to an entirely separate cause of action."

means the contract judgment or the $4.00 judgment for breach of fiduciary duty is unstated), respondents deprived the Court of Appeals of jurisdiction over the appeal under Article III, Section 2 of the Constitution. This Court, however, delivered an opinion pertaining to Article III that refutes Petitioner's argument. In *Deposit Guaranty Nat'l Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980), *rehearing denied*, 446 U.S. 947 (1980), the Court stated:

> "Congress has vested appellate jurisdiction in the Courts of Appeals for review of final decisions of the district courts. 28 U.S.C. Section 1291 . . . A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it . . . The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does *not* have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.

445 U.S. at 333-34 (footnote and citations omitted) (emphasis added). The principle of law articulated by this case is well-settled and need not be reexamined.

CONCLUSION

For the reasons discussed above, the Petition for Certiorari should be denied.

Respectfully submitted,

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